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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES MCKINNEY,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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QUESTIONS PRESENTED

1. Whether, in a criminal obscenity prosecution, the due process requirements of the Fourteenth Amendment to the Constitution of the United States are met where evidence of defendant's prior arrests which did not result in convictions are admitted to prove scienter, a necessary element of the crime.

2. Whether, under the First and Fourteenth Amendments to the Constitution of the United States, mere ownership interest in an adult bookstore is sufficient to impose criminal liability upon the owner for the obscenity of the material seized.

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No.

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CHARLES MCKINNEY,
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STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District, entered on August 26, 1986.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Eastern District, is reported at 718 S.W.2d 583 (Mo. App. 1986). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. section 1257(3) for review by certiorari of the decision of the Missouri Court of Appeals, Eastern District. A memorandum opinion was issued by the Circuit Court of the City of St. Louis and is

included in the Appendix as Exhibit B. A written opinion affirming petitioner's conviction was issued by the Missouri Court of Appeals, Eastern District, on August 26, 1986. The Court of Appeals denied a timely petition for rehearing or transfer to the Missouri Supreme Court on October 1, 1986. A copy of the order denying rehearing and transfer is included in the Appendix as Exhibit C. Petitioner timely applied to the Supreme Court of Missouri for transfer. On November 18, 1986, the Missouri Supreme Court denied the Application to Transfer. A copy of the order denying Application to Transfer is included in the Appendix as Exhibit D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States and the relevant portion of the Missouri Pornography Statute, 573.030, R.S. Mo., are set forth in the Appendix as Exhibits E and F.

STATEMENT OF THE CASE

On February 21, 1985, St. Louis Police Department Detective Steven Philipak entered Bobbie's Books at 4626 Gravois, St. Louis, Missouri. Situated on racks in the store were magazines and paperback books. Detective Philipak purchased a magazine, stipulated at trial to be pornographic in nature.

Petitioner arrived at the store forty-five minutes after the magazine was purchased and Detective Philipak did not then, nor did he ever, speak to Petitioner. Upon his mere arrival at the scene, however, Petitioner was arrested and charged with promoting pornography in the second degree, a Class A misdemeanor. A criminal information alleged that petitioner violated Section 573.030, R. S. Mo., by having, "knowing its content and character, promoted pornographic material for pecuniary gain. . . ."

Prior to trial, petitioner filed a motion to suppress evidence, citing the Missouri Constitution, Article I, sections 10, 15, 18(a) and the United States Constitution Amendments Fourth, Fifth, Sixth, and Fourteenth. The trial court denied the Motion to Suppress Evidence.

At the conclusion of the state's case in chief, in a jury waived trial, petitioner moved for a judgment of acquittal, arguing that evidence of scienter, an indispensable element of the crime, had not been proven by competent evidence in a First Amendment situation. The trial court denied the motion for acquittal. The petitioner presented no evidence. The judge returned a verdict of guilty of promoting pornography in the second degree and issued its Memorandum Opinion, set forth in Appendix Exhibit B.

The petitioner's timely motion for a new trial was denied and he was sentenced to pay a fine of $100. The petitioner's post trial motion preserved the constitutional issues of sufficiency of the evidence and necessity of competent evidence to prove a necessary element of the crime.

The petitioner appealed to the Missouri Court of Appeals, Eastern District, and continued to assert the constitutional issue relating to the failure of the State's proof on the scienter element. On August 26, 1986, the Eastern District of the Missouri Court of Appeals affirmed petitioner's conviction.

A timely application for rehearing or transfer to the Missouri Supreme Court was filed with the appellate court, which denied the Application. A timely application to transfer was then filed in the Missouri Supreme Court, again raising the issues of competency of evidence and sufficiency of admissible evidence to prove scienter. The application to transfer the cause from the Eastern District Court of Appeals to the Missouri Supreme Court was denied on November 18, 1986.

REASONS FOR GRANTING THE WRIT

I.

An Obscenity Conviction Of An Adult Bookstore Owner Violates The Due Process Requirements Of The Fourteenth Amendment To The Constitution Where Evidence Of Prior Arrests Not Resulting In Convictions Are Used To Supply An Essential Element Of The Crime.

In *Smith v. California,* 361 U.S. 147 (1959) this Court addressed the necessity of proof of scienter in an obscenity conviction in order to avoid the dangers of self-censorship. Although *Smith* left open what type of circumstantial evidence might be admissible to prove such scienter, opinions by this Court both before and after *Smith* have held that the Fourteenth Amendment due process guaranty requires that sufficient, *relevant* evidence of each and every element of the crime must be proved beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *Harris v. United States,* 404 U.S. 1232 (1971). (Douglas, J., in chambers). *In re Winship,* 397 U.S. 358 (1970); *Johnson v. Florida,* 391 U.S. 596 (1968). See also, *Thompson v. Louisville,* 362 U.S. 199 (1960); *Adderly v. Florida,* 385 U.S. 39 (1966); *Douglas v. Buder,* 412 U.S. 430 (1973). This case presents an important question relating to the type of circumstantial evidence constitutionally adequate to prove scienter. At the same time, the result in this case is in conflict with the principles and reasoning of the above cases.

In this case, the prosecution presented corporate records and an application for city license application, both bearing the name of defendant. The police officer who purchased the material was then allowed to testify, over the objection of petitioner's counsel, about prior arrests of petitioner for the crime of promoting pornography. Another officer testified concerning a previous arrest of defendant. None of the arrests had ever resulted in a conviction. The testifying officers had never arrested petitioner nor had they ever spoken to Petitioner. There

was no evidence of any statements made by the Petitioner at any time concerning the material in question. There was no evidence that the subject material was ever seen in the possession of the Petitioner. At the time of sale of the material Petitioner was not even in the store. In fact, Petitioner arrived at the store forty-five minutes after the sale and was arrested by an officer who did not testify.

This Court, in *Vachon v. New Hampshire,* 414 U.S. 478 (1974), found that a bookseller's conviction for wilfully contributing to the delinquency of a minor violated due process because there was no evidence that the defendant had sold the material in question (a button inscribed "Copulation not Masturbation"), that he knew it had been sold to a minor, that he authorized such sales to minors, or that he was even in the store at the time of the sale. Controlling the premises at the time of sale "was in no way probative of the crucial element of the crimes that he personally sold the minor the button or personally caused it to be sold to her." Analogously, having been arrested for the same crime is not probative in this case since it is not even an act on the part of Petitioner and this Court should similarly invalidate Petitioner's conviction.

Cases following *Smith v. California,* have attempted to delineate the parameters of defendant conduct constituting scienter, however, the cases demand words or conduct on the part of defendant himself. In *Mishkin v. New York,* 383 U.S. 502 (1966), this Court approved of a set of facts constituting scienter, but this was so because the facts included *defendant's actions,* such as instructions to artists and writers and his efforts to disquise his role in the enterprise (383 U.S. at 511-512).

This case differs significantly from *Mishkin* and other decisions reached by state courts in that Petitioner was convicted on the actions and words of others, not himself. Those "others" were police officers who neither spoke with Petitioner nor saw the material in his possession.

The Missouri Court of Appeals allowed testimony regarding the arrests based on an exception to the general evidentiary rule which excludes evidence of separate and distinct crimes, bad acts, or similar acts. That exception was not for identification purposes but to show circumstantial evidence of the element of knowledge. The court's reasoning, however, overlooks the facts that an arrest is not an act on the part of the arrested individual; rather that individual is the recipient of the act. Circumstantial evidence, if relevant at all, must be based upon defendant's words or actions. The case of *U.S. v. Branson,* 398 F.2d 929 (6th Cir. 1968) gives guidance regarding those circumstances: "Since the intent with which an act is done is rarely if ever susceptibe of proof by direct evidence, it must be ascertained from outward manifestations—from words or acts of a *party* in accomplishing the act and from the fact and circumstances attendant upon the act" (398 F.2d at 943) (emphasis supplied). Acts or statements of a party are relevant; not those actions, such as arrests, *received* by a party. A prior act exception to the general rule of inadmissibility of prior arrests implies that the act is one done by, not to, the accused. If the Missouri Court of Appeals is allowed to view the fact of arrest without conviction as a prior bad act or prior similar act sufficient to supply scienter, this case will have the immediate and wide-ranging effect of allowing police action to supply the scienter element, a critical element, of an obscenity conviction. Unrestrained police actions and arrests could result and obscenity cases be built solely on police persistence. Such a due process violation must not be allowed to stand.

In *Douglas v. Buder,* 412 U.S. 430 (1973) this Court overturned another Missouri case. The *Buder* case dealt with a probation revocation, wherein the trial court viewed in a novel way the fact of an issuance of a traffic citation to the defendant. The trial court, without Missouri precedent, viewed the receipt of a traffic citation as an "arrest" which constituted grounds for probation revocation. This Court, in overturning the *Buder* decision, stated that:

> "Moreover, even if it were clear that respondent (trial court judge) had declared Missouri law to be that a traffic citation is the equivalent of an arrest, we would have to conclude that under the rationale of *Bouie v. City of Columbia,* 378 U.S. 347 (1964), the unforeseeable application of that interpretation in the case before us deprived petitioner of due process. We held in *Bouie* that '(w)hen. . . (an) unforesseable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemlated conduct constitutes a crime."
>
> (412 U.S. at 429).

Similarly, no Missouri case exists which views an arrest without conviction as competent evidence of scienter. Such a view as the Missouri Court of Appeals has taken in this case violates the due process clause of the Fourteenth Amendment to the United States Constitution.

The Missouri Court of Appeals appears to have done indirectly that which it has invalidated when attempted by a legislative body, namely, set up a rebuttable presumption on the issue of scienter. In *St. Louis County v. Glore,* 715 S.W.2d 565 (Mo. App. 1986), the Missouri Court of Appeals by declaring unconstitutional a presumption of scienter, invalidated that section of a St. Louis County ordinance which it found to "eliminate this element (scienter), or at least remove the burden on the prosecution to establish scienter beyond a reasonable doubt" (715 S.W.2d at 568). That ordinance contained a "presumptions" section including one which read "A person who promotes material or possesses the same with the intent to promote it in the course of his business is presumed to do so knowingly for monetary consideration."

However, allowing testimony of prior arrests serves the same purpose and creates the same presumption which the Court of

Appeals invalidated in *Glore,* namely, removing the burden on the prosecution to establish scienter beyond reasonable doubt. It is not the suspicions, legal conclusions, or actions on the part of police which are relevant to a finding of scienter, but those actions of the defendant. In this case such actions are fatally lacking.

The *Smith* decision was predicated on the inhibiting effect that absolute liability obscenity statutes would have on first amendment rights, and was decided for the express purpose of eliminating problems of self-censorship inherent in such statutes. If police action is allowed to supply scienter then the bookseller is forced to become a censor and the state is thus able to indirectly suppress what it could not suppress directly, simply by persistent police action in building a history of arrests. In addition, if allowed to stand, this decision and consequent police action may compel the defendant to testify in his own behalf in order to rebut the presumption attaching to such police action and in violation of the constitutional right of an accused not to testify. An arrest where no conviction was had is not competent evidence of knowledge of obscenity on the part of the arrested individual. If it were, what this Court foresaw in *Smith* might well become commonplace, namely, "the bookseller's self-censorship, compelled by the State, affecting the whole public, hardly less virulent for being privately administered."

II.

An Obscenity Conviction Of A Bookstore Owner On The Basis Of Corporate Documents And Prior Arrests Not Resulting In Convictions Constitutes Strict Liability In A Pornography Case, A Result Condemned By This Court In *Smith v. California,* 361 U.S. 147 (1959).

The evidence used to convict petitioner in this case was twofold: (1) corporate records and a city license application relating to the bookstore and bearing petitioner's name; and (2)

testimony of a police officer concerning previous arrests of petitioner. It is quite clear that without the evidence of prior arrests the constitutional standard of evidence of scienter would not be met, for this court has condemned the imposition of absolute or strict liability in an obscenity case. *Smith v. California,* 361 U.S. 147 (1959). In reversing the obscenity conviction of the proprietor of a bookstore, the *Smith* court discussed the policy reasons behind the scienter requirement. If the requirement of scienter is dispensed with:

> Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience''. . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

361 U.S. at 153-154 (Citations and footnotes omitted).

Although the opinion in *Smith* indicated that circumstantial evidence may be used to show the bookseller's knowledge of the contents of a book, it did not sanction drawing such an inference from the mere fact of ownership or interest in a bookstore. See also, *Vachon v. New Hampshire, supra.* If such

an inference could be drawn it would require something the *Smith* opinion determined to be an unreasonable burden, namely, the requirement that a bookseller "make himself aware of the contents of every book in his shop."

On the issue of scienter this Missouri Court of Appeals case is in conflict with the highest courts of other states. In *Davis v. State,* 658 S.W.2d 572 (Tex. Cr. App. 1983), the court held that the mere acts of allowing the business establishment to be open to the general public and giving of change did not provide sufficient direct or circumstantial evidence establishing that the defendant had knowledge of the character and content of the film at issue.

Insufficient evidence of scienter has also been found in *Commonwealth v. Thureson,* 357 N.W.2d 750 (Mass. 1976) and *Commonwealth v. Rosenberg,* 398 N.E.2d 451 (Mass. 1979).

In *People v. Andrews,* 23 Cal. App.3d 1, 100 Cal. Rptr. 276 (1972) the Superior Court of Los Angeles, Appellate Department, specifically found that an ownership interest, without evidence that the owners ever saw, bought or read the specific material, or participated personally in its sale, was not enough to prove scienter. Here there is a complete lack of evidence that the Petitioner ever saw, bought or read the material, or participated in its sale.

The Court of Criminal Appeals of Texas in *Beier v. State,* 687 S.W.2d 2 (Tex.Cr.App. 1985) reversed the conviction of a manager of an adult bookstore for insufficient evidence. The court's observation is particularly appropriate in this case:

> The opinion of the court of appeals comes dangerously close to authorizing appellant's conviction based upon proof of his status as the manager of an enterprise, so long as he knew that the enterprise had criminal potential. . . Under our law a person is not punished for his status, but for his conduct. See also *Robinson v. California,* 370 U.S.

660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (status offense violative of Fourteenth Amendment.) Cf. *Powell v. Texas,* 392 U.S. 514, 88 S. Ct. 2145, 20 L.Ed.2d 1254 (1968).

687 S.W.2d at 4-5.

In this case, petitioner has been convicted on nothing more than his business connection (as evidenced by corporate records) and the irrelevant and constitutionally infirm evidence of prior arrests not resulting in convictions. This decision is inconsistent with First Amendment principles articulated by this court and with decisions of the highest courts of other states. This court should grant certiorari to resolve this important issue.

CONCLUSION

Because the decision of the lower court is in conflict with decisions and principles announced by this Court and its own decision in *St. Louis County v. Glore,* is in further conflict with the highest courts of other states, and because valuable First Amendment interests and Due Process guarantees are at issue, this Court should grant a writ of certiorari to review the judgment and opinion of the Missouri Court of Appeals, Eastern District.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 50477

State of Missouri,
Respondent,

vs.

Charles McKinney,
Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Robert G. Dowd, Jr.

OPINION FILED: August 26, 1986

Charles McKinney, defendant, was convicted in a court tried case of promoting pornography in the second degree. § 573.030 RSMo 1978. He was sentenced to pay a fine of $100.00.

A rendition of facts pertinent to this appeal follows: On February 21, 1985, detectives Philipak and Zouglas of the St. Louis Police Department investigated a book store located at 4626 Gravois Road in the City of St. Louis. The store is called "Bobbie's Books" and was subjected to investigation because allegedly obscene material was being sold there. On that day, Detective Philipak obtained a magazine from the store containing explicit sexual material. Defendant arrived at the store approximately forty-five minutes after Philipak obtained the book and was arrested for promoting the sale of the magazine.

At trial, defendant stipulated that the magazine was of a pornographic and obscene nature. Defendant, however, denied that he had knowledge of its content and character; a requisite element of the offense for which he was convicted. At trial, the state presented three exhibits and called two witnesses.

State's Exhibit #1 consisted of certified corporate records of Trader Bob, Inc. from the office of the Secretary of State of Missouri. These records listed Charles McKinney as an incorporator, registered agent, president, treasurer, and a member of the board of directors. Also appearing on these records was the signature of Charles McKinney.

State's Exhibit #2 was a City of St. Louis Merchant and Business License Tax Return for 1984 for the business, Bobbie Book Store #3, 4626 Gravois Road, St. Louis, Missouri. The signature of Charles McKinney appears on the return, along with Trader Bob, Inc. as the name of the firm.

State's Exhibit #3 was the magazine obtained by Detective Philipak.

All three of the State's Exhibits were admitted into evidence over defendant's objections. Defendant premised his objections to Exhibits #1 and #2 on the relevancy of these exhibits. More specifically, defendant argued that there was no proof by the state that the person who signed the exhibits was the defendant. As to the admission of Exhibit #3, defendant generally objected.

The first witness called by the state was Detective Philipak. Philipak testified that during his investigation he had observed defendant visit the book store everyday. He testified that he had been present during four or five previous investigations when the defendant had been arrested for promoting pornography. He had heard the defendant being advised of his rights and why he was being arrested. On cross examination, Philipak testified that he had never personally met or talked to

the defendant, nor had he discussed the magazine in question with the defendant.

The state's second witness was Detective Zouglas. Zouglas testified that the general nature of all materials for sale at the book store was pornographic. He testified that the books and magazines for sale depicted various sexual acts including homosexuality, sodomy, oral sex, and intercourse. He identified defendant at trial as having been arrested at the store on February 21, 1985, and also testified that he was familiar with defendant from previous investigations and arrests of the defendant for promoting pornography.

At the conclusion of the state's case the defendant moved for a directed verdict of acquittal. This was denied. No evidence was presented by the defendant.

As we discern from the briefs and the record, the central issue on appeal is whether defendant had "knowledge of the content and character" of the admittedly pornographic magazine. In order to prove the knowledge element of the crime the state attempted to show, by use of Exhibits #1 and #2, that defendant, as principal officer, director, and incorporator of the corporation operating Bobbie's Books, knew of the content and character of the items sold there - i.e. the magazine in question. The state also attempted to prove knowledge by showing that the defendant had been arrested for the same offense four or five times in the past and that he had visited the bookstore everyday during the period of investigation.

It is well settled that the element of knowledge must be proved beyond a reasonable doubt in order to convict a person for promoting pornography. Smith v. People of the State of California, 80 S.Ct. 215, 219 (1959). This requirement has been codified in the statute defining the crime. § 573.030 RSMo 1978. In order to satisfy this requirement the state must show "some knowledge of the nature of the contents of the publication" on the part of the defendant. State v. Smith, 422 S.W.2d

50, 62 (Mo. banc 1967). It is not necessary, however, that the defendant know that the publication's contents are obscene. State v. Flynn, 519 S.W.2d 10, 13 (Mo. 1975); State v. Schamma, 659 S.W.2d 589, 592 (Mo. App. 1983). The element of knowledge may be established by circumstantial evidence. Eyewitness testimony of a bookseller's perusal of the magazine is not required. *Smith v. California,* 80 S.Ct. at 219; *Schamma,* 659 S.W.2d at 592. It is permissible to infer knowledge of pornographic content from all the relevant and admissible evidence in the case.

Defendant does not dispute the foregoing principles. He argues, however, that there is no evidence to support his knowledge of the content and character of the magazine. Defendant maintains that, in Missouri, there must be evidence of a statement made by the accused to demonstrate his knowledge of the content of an allegedly obscene item. Defendant claims that because neither Detective Philipak nor Detective Zouglas had any conversation or other contact with defendant concerning the magazine in question there is no evidence from which scienter can be inferred. We disagree. Defendant correctly points out in his brief that "[c]ircumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist." State v. Famber, 214 S.W.2d 40, 43 (Mo. 1948); MAI-CR2d 33.42. Circumstantial evidence used to establish knowledge need not consist of statements of the accused. As defined, such evidence may be comprised of any evidence that makes reasonable the inference that the ultimate fact exists.

As noted, the circumstantial evidence in the case at bar is state's Exhibits #1 and #2 (corporate records and license tax receipt) and the testimony by Detectives Philipak and Zouglas concerning defendant's prior arrests. Defendant argues that all this evidence was improperly admitted. We deal with each item separately.

Exhibit #1 consisting of certified corporate records of an entity named Trader Bobs, Inc. Under § 490.180 RSMo 1978, such records are admissible in our courts without anything further.

Defendant maintains, however, that the records are irrelevant in that no foundation was laid connecting him with the records introduced. The state did not offer evidence to establish that the Charles McKinney on trial was the same Charles McKinney who was named in, and whose signature appeared on, the corporate records. Hence, it is argued, the records do not show that defendant was involved in the operation of Bobbie's Books and, therefore, do not constitute circumstantial evidence of his knowledge. We disagree.

First, Trader Bob's, Inc. was connected to Bobbie's Books through state's Exhibit #2, the license tax receipt. Trader Bob's, Inc. appears as the firm name doing business under the trade name of Bobbie's Books. (The admissibility of the tax receipt will be discussed *infra.*) Second, defendant is linked to the corporate records under the identity doctrine. It has long been held in Missouri that identity of names is prima facie evidence proof of the identity of the person. *See,* State v. Kelso, 76 Mo. 505, 507 (1882); State v. McGure, 87 Mo. 642, 643 (1885). *See also,* 65 C.J.S. Names § 15(2). However, the presumption of identity of person from identity of names is not conclusive. The presumption is rebuttable, but sufficient to shift the burden of going forward with evidence. It is liable to be shaken by the very slightest proof of facts or showing of circumstances which produce a doubt of identity. Jones v. Phillips Petroleum Co., 186 S.W.2d 868, 873 (Mo. App. 1945).

In the instant case, the name on the corporate records is identical to that of the defendant; Charles McKinney. It is presumed that they are one and the same person until evidence is presented to the contrary. State v. Davis, 367 S.W.2d 517, 521 (Mo. 1963). Defendant did not do so. Thus, a requisite link between the records and the defendant exists so as to constitute

evidence that the defendant was a principal in the operation of Bobbie's Books. These records are circumstantial evidence of his knowledge.

Exhibit #2, the license tax receipt, was objected to by defendant on the same grounds of relevancy as Exhibit #1. No hearsay or foundation objection was raised at trial and accordingly they will not be considered on appeal. State v. Jones, 569 S.W.2d 15, 16 (Mo. App. 1978). The only objection preserved is that the state failed to connect defendant with the tax receipt. Once again, however, the identity of defendant was established through the presumption of identity of name. Defendant did nothing to refute this. Thus, defendant's contention is without merit.

Defendant's final contention is that the trial court erred in allowing testimony about defendant's previous arrests for promoting pornography. Defendant first argues that the testimony by Detective Philipak constituted hearsay in that his information about defendant's prior arrests was based on "conversations" with other police officers. This is not what is reflected in the transcript. Detective Philipak testified that he was present on the previous occasions when defendant was arrested. He was not the arresting officer, but he knew of his own knowledge why defendant was being arrested. This is not hearsay. This testimony was based on personal observation and knowledge. For this reason, no arrest record was necessary to prove the prior arrests.

Defendant next argues that his prior arrests cannot be used to show knowledge because he had never been convicted on any of the charges. First, he asserts that because there were no convictions, it is just as logical to conclude that his prior arrests without conviction showed a lack of knowledge, as well as its presence.

The well established general rule is that evidence of separate and distinct crimes or bad acts is not admissible, unless it has

some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial. State v. Trimble, 638 S.W.2d 726, 732 (Mo. banc 1982). Here the evidence was probative of a material element of promoting pornography, namely defendant's knowledge. All the prior arrests testified to were for promoting pornography, crimes identical to the instant case. At the very least, the arrests are indicative to defendant's knowledge that the materials carried by Bobbie's Books were of a pornographic nature. Therefore, it was properly admitted. That other inferences may be drawn is of no consequence. What matters is that the testimony has a legitimate tendency to establish defendant's guilt in this case.

Next, defendant argues that it was prejudicial error for the court to have admitted the testimony of defendant's prior arrests because knowledge is not an exception to the general rule barring such testimony. Defendant admits that the purpose for which the prior arrests were introduced was as evidence of defendant's knowledge of the content and character of the magazine. He denies, however, that his is an exception to the general rule prohibiting proof of prior bad acts when there has been no conviction. We do not agree.

In State v. Cheesebrew, 575 S.W.2d 218 (Mo. App. 1978), the defendant was charged with possession of marijuana. The trial court admitted testimony by a police officer that he had observed marijuana in the defendant's trailer on an earlier date. The defendant objected because the evidence was of a crime different from that which defendant was charged. In *Cheesebrew,* we said, in affirming the trial court:

> It was necessary in this case for the state to show that the defendant *knew* of the character of the substance, and that he was intentionally in possession of it. The fact that there was a quantity of marijuana in defendant's trailer and that it was being used by defendant and others in this trailer on February 25 had a legitimate tendency to prove that he

> *knew* of the character of the substance and that his possession on March 5 was intended. 575 S.W.2d at 222. (emphasis added).

In the present case, proof that defendant had been arrested previously for the identical offense for which he was tried was logically pertinent as tending to prove he knew of the content and character of the magazines available in the bookstore. As such, the evidence constituted one of the exceptions to the rule prohibiting proof of other crimes and the testimony was properly admitted.

Thus, there is ample circumstantial evidence to support defendant's knowledge. Judgment affirmed.

PAUL J. SIMON, JUDGE

KENT E. KAROHL PRESIDING JUDGE concurs

GARY M. GAERTNER JUDGE concurs

APPENDIX B

IN THE CIRCUIT COURT CITY OF ST. LOUIS

State of Missouri

vs.

Charles McKinney

No. 859-00709 Room 24 July 5, 1985

MEMORANDUM FOR CLERK

Trial in the above cause on the charge of Promoting Pornography 2d Degree was heard on 5/21/85. It was stipulated that the sole issue to be determined was whether above defendant knew the "content and character" of the pornographic magazine in question pursuant to RSMo 573.030. Cause continued to 6/28/85 for submission of legal memoranda; cause continued to 7/5/85 for disposition.

Upon evidence adduced and legal authority submitted this Court hereby finds defendant GUILTY of the charge of Promoting Pornography 2d Degree. Defendant is hereby fined $100.00 and costs.

As a basis for its' ruling this Court adopts the State's argument on the issue of scienter and in addition cites the following two cases for the proposition that the admission of other "crimes" to prove defendant's "guilty knowledge" does not necessarily mean that these other "crimes" must be final convictions. (see State v. Armstead, 283 SW 2d 577; and State v. Smith 431 SW 2d 74)

SO ORDERED:

/s/ Robert G. Dowd, Jr.

cc. R. Margulis, for State
D. Devereaux, for Def.

APPENDIX C

MISSOURI COURT OF APPEALS
EASTERN DISTRICT

To: Attorney of Record — Page: 1 of 1

From: Deirdre O. Ahr — Date: October 1, 1986

Re: Motions for Rehearing and/or Transfer to Supreme Court - Denied

1	49886	State of Missouri Butler, Samuel	Resp vs. App.
2	50477	State of Missouri McKinney, Charles_	Resp vs. App.
3	50511	Wadlow, Rodney B/N/F Brenda Wadlow General Motors Corp., et al.	App vs. Resp
4	50614	State of Missouri Pollard, Jeffrey	Resp vs. App.
5	50727	Gildehaus, Michael, Dec'd, et al. Husky Corporation	App vs. Resp
6	50939	May, James U.B.C. Marketing	Resp vs. App.

Re: Motions for Rehearing - Denied

1	50006	State of Missouri Harris, Henry	Resp vs. App.
2	50023	State of Missouri Warren, Dana	Resp vs. App.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 50477

State of Missouri,
Respondent,

vs.

Charles McKinney,
Appellant.

APPELLANT'S MOTION FOR A REHEARING BY THE COURT SITTING EN BANC, OR IN THE ALTERNATIVE TO TRANSFER TO THE SUPREME COURT

COMES NOW Appellant, Charles McKinney, by and through counsel, and moves this Honorable Court for a rehearing by the Court en banc or transfer to the Supreme Court on the following grounds.

1. The Court entered its opinion in the above-styled case on August 26, 1986, and thus, this Alternative Motion is made and presented within fifteen (15) days of said date.

2. This case involves the following issues:

a. Whether there was sufficient admissible evidence to prove that Appellant knew the content and character (had scienter) of the alleged pornographic material, State's Exhibit 3.

b. Whether the trial Court erred in admitting unqualified and irrelevant records into evidence, State's Exhibits 1 and 2.

c. Whether the trial Court erred in allowing hearsay evidence of prior arrests of Appellant (none of which resulted in a conviction nor involved State's Exhibit 3) as evidence of scienter.

3. This Court misconstrued and misapplied the existing law which concerns not just issues of general interest but also issues

of Constitutional importance involving the First Amendment to the United States Constitution of Article XIII, paragraph 16 of the Constitution of the State of Missouri. The record and transcript of this trial remain devoid of even a suggestion that Appellant had any connection or contact with State's Exhibit 3 (the allegedly pornographic magazine); much less, that he was even faintly aware of its contents.

WHEREFORE, for the above-stated reasons, Appellant moves this Court for a rehearing by the Court en banc, or, in the alternative, for a transfer to the Supreme Court of Missouri.

DEVEREAUX & STOKES, P.C.

DANIEL R. DEVEREAUX, #19612
Attorney for Appellant
1215 Pine Street
St. Louis, MO 63103
621-3743

Certificate of Service

A copy of the foregoing was mailed this _____day of September, 1986, to Mr. Robert A. Margulis, Assistant Circuit Attorney, 1320 Market Street, Room 330, St. Louis, MO 63103.

DANIEL R. DEVEREAUX

APPENDIX D

IN THE SUPREME COURT OF MISSOURI

No. 68704

ED 50477

September Session 1986

State of Missouri,
Appellant,

vs.

Charles McKinney,
Respondent.

TRANSFER

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1986, and on the _____ day of _____ 1986, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 18th day of November, 1986.

/s/ Thomas F. Simon, Clerk.

_____ D.C.

APPENDIX E

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

Chapter 573

Pornography and Related Offenses

573.030. Promoting pornography in the second degree.— 1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:

(1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or

(2) Produces, presents, directs or participates in any pornographic performance for pecuniary gain.

2. Promoting pornography in the second degree is a class A misdemeanor.

(L 1977 S.B. 60)
Effective 1-1-79

Supreme Court, U.S.
FILED
JUN 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES MCKINNEY,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

On Petition For A Writ of Certiorari
To The Missouri Court Of Appeals
For The Eastern District

SUPPLEMENTAL BRIEF OF THE PETITIONERS

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14 pp

QUESTION PRESENTED

Whether the Missouri Pornography Statute is unconstitutional on its face, in light of *Pope v. Illinois*, ____ U.S. ____, 55 U.S.L.W. 4595 (No. 85-1973, May 4, 1987).

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No. 86-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES MCKINNEY,
Petitioner,

VS.

STATE OF MISSOURI,
Respondent.

On Petition For A Writ of Certiorari
To The Missouri Court Of Appeals
For The Eastern District

SUPPLEMENTAL BRIEF OF THE PETITIONERS

ARGUMENT

I. The Missouri Pornography Statute Is Unconstitutional On Its Face In That It Requires That The Value Of A Work Be Judged By Contempory Community Standards, Not Objective Standards, As Required By *Miller v. California,* 413 U.S. 15 (1973), And Clarified By The Recent Decision Of *Pope v. Illinois,* ____ U.S. ____, 55 U.S.L.W. 4595 (No. 85-1973, May 4, 1987).

After filing Petitoner's petition for writ of certiorari in this case, This Honorable Court issued the decision of *Pope v. Illinois,* on May 4, 1987. The *Pope* decision clarified the *Miller v. California* decision and is critical to the decision in the case at bar.

The *Pope* case dealt with obscenity convictions of two adult bookstore clerks in Illinois. The juries in those cases were instructed that, to convict, they must find the magazines to be without value and were also instructed to judge whether the material was obscene by determining how it would be viewed by ordinary adults in the whole state of Illinois. The Illinois appellate court had rejected the defendants' contention that the "value" issue must be determined by an objective basis and not by reference to "contemporary community standards." This Honorable Court vacated and remanded for a determination by the Illinois Court of Appeals whether the legally incorrect instruction constituted "harmless error."

In its decision, this Court stated that "The third prong of the *Miller* test requires the trier of fact to determine 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,' " 413 U.S. 24, but that such a determination must be made by referring to an *objective* standard and *not* a standard based on contemporary community values. In the slip opinion at pages 2 and 3, this Court stated:

> "There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards. Indeed, our cases are to the contrary. *Smith v. United States,* 431 U.S. 291 (1977), held that, in a federal prosecution for mailing obscene materials, the first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — are issues of fact for the jury to determine applying contemporary community standards. The Court then observed that unlike prurient appeal and patent offensiveness, "literary, artistic, political, or scientific value ... is not discussed in *Miller* in terms of contemporary community standards." (431 U.S. 301-302).... This comment was not meant to point out an oversight in the *Miller* opinion, but to call attention to and approve a deliberate choice....

> The proper inquiry is not whether an ordinary member of a given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."

This Court did not facially invalidate Illinois' statute because the statute under which the clerks were convicted was no longer on the books, having been replaced with a statute that does *not* call for the application of community standards to the value question, and so, presumably, is constitutional. See, Ill. Rev. Stat., Chap. 38, Par. 11-20(b) (1985) (effective January 1, 1986), which statute provides in relevant part:

> "Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, intimate sexual acts or sado-masochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibitions of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political, or scientific value."

The case at bar, however, was tried under the Missouri Pornography Statute, which defines pornographic, in Section 573.010(1), R.S.Mo., as follows:

> "any material or performance is 'pornographic' if, considered as a whole, *applying contemporary community standards:*
>
> (1) Its predominant appeal is to prurient interest in sex; and
>
> (2) It depicts or describes sexual conduct in a patently offensive way; and
>
> (3) It lacks serious literary, artistic, political or scientific value.

> In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults." (Emphasis supplied).

The definition of pornography is applicable to Section 573.030, R.S.Mo. under which Petitioner in this case was convicted.

The difference between Illinois' statute and Missouri's is apparent. Illinois' statute, presumably constitutional, does not apply contemporary community standards to the third prong, the value test. However, reading Missouri's statute, it is clear that the phrase "applying contemporary community standards" modifies *all three* parts of the test, including part (3), the "value" section. Thus, on its face, the statute contravenes *Miller* and, according to the *Pope* decision, is unconstitutional.

Although this issue was not raised in Petitioner's Petition for Writ of Certiorari, it is within the jurisdiction of this Court to consider such an important issue under the plain error doctrine, under Supreme Court Rule 34.1(a). *Vachon v. New Hampshire,* 414 U.S. 478 (1974).

CONCLUSION

Because the Missouri Pornography Statute is unconstitutional on its face under *Pope v. Illinois,* and because valuable First Amendment interests are at issue, your Petitioner prays this Honorable Court review the judgment and opinion of the Missouri Court of Appeals, Eastern District, declare the Missouri Pornography Statute unconstitutional and void the conviction of Petitioner obtained under it.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A

Chapter 573 — Pornography and Related Offenses

573.010. Chapter Definitions

As used in this chapter

(1) "**Pornographic**", any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In deterining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults;

(2) "**Material**" means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects;

(3) "**Performance**" means any play, motion picture film, dance or exhibition performed before an audience;

(4) **Promote**" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same;

(5) "**Furnish**" means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide.

(6) "**Wholesale promote**" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale;

(7) "**Minor**" means any person under the age of eighteen;

(8) "**Pornographic for minors**", any material or performance is "pornographic for minors, if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) It lacks serious literary, artistic, political, or scientific value for minors;

(9) "**Nudity**" means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering;

(10) "**Sexual conduct**" means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification;

(11) "**Sexual excitement**" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

(12) "**Sadomasochistic abuse**" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification;

(13) **"Explicit sexual material"** means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or[1] unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals; provided however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition;

(14) **"Displays publicly"** means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others.

(L.1977, S.B.No.60, p. 662, § 1, eff. Jan. 1, 1979.)

---

[1] So in original; probably should read "of".

573.030. Promoting pornography in the second degree. —

1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:

(1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or

(2) Produces, presents, directs or participates in any pornographic performance for pecuniary gain.

2. Promoting pornography in the second degree is a class A misdemeanor.

(L 1977 S.B. 60)
Effective 1-1-79

APPENDIX B

Illinois Obscenity Statute, Ill.Rev.Stat. 1985, ch. 38, ¶11-20 (effective January 1, 1986)

¶ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult

community standards, would find that it depicts or describes, in a penalty offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children, or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.